Neutral Citation Number: [2024] EAT 53

Case Nos: EA-2019-000497-OO
EA-2019-000499-OO
EA-2019-000500-OO
EA-2019-000501-OO
EA-2019-000502-OO
EA-2019-000504-OO
EA-2019-000506-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 April 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

BRITISH AIRWAYS PLC

Appellant/Respondent

- and –

MS T DE MELLO
MR E ARDABILI, MS D O'DWYER
MR V TEXEIRA, MR A DUFFY
MRS O KERR

Respondents/Appellants

- -
- -

Talia Barsam (instructed by Harrison Clark Rickerbys Limited) for **British Airways plc**
Nicola Newbegin (instructed by Lloyd Donnelly Solicitors Limited) for **Ms De Mello**, **Mr Ardabili**, **Ms O'Dwyer and Mr Texeira**
Mr Duffy in person, **Mrs Kerr** in person

Hearing dates: 12 and 13 March 2024

- -

JUDGMENT

© EAT 2024

SUMMARY

WORKING TIME – holiday pay – normal pay

WAGES – time limits – series of deductions

At the time when the present claims arose the remuneration of British Airways Cabin Crew involved a large number of allowances, payable in a variety of circumstances, over and above basic pay. This dispute related to which of these allowances should or should not form part of statutory working time holiday pay, in particular in accordance with applicable principles of EU Law.

This decision addresses the approach to be taken to the concept of normal pay for these purposes, particularly where there is an issue as to whether an allowance should be viewed as a performance payment, and part of normal pay, or an expenses payment, and not part of normal pay. It also considers the current legal position in relation to the concept of a "series" of deductions, in light of the decision of the Supreme Court in **Chief Constable of the Police Service of Northern Ireland v Agnew** [2023] UKSC 33; [2024] ICR 51.

© EAT 2024

HIS HONOUR JUDGE AUERBACH:

Introduction

1. These appeals relate to the statutory holiday pay entitlement of members or former members of British Airways Cabin Crew. They raise issues relating to the principles governing the calculation of normal pay for these purposes and as to the time limit for tribunal claims asserting underpayment. I will refer to the parties as they are in the employment tribunal, as claimants and respondent.

2. During the relevant period the respondent had a complex pay system providing for multiple allowances that supplemented Cabin Crew's basic pay in various respects or circumstances. Issues arose as to which of these allowances should be reckoned in to holiday pay. Starting in 2007, multiple group claims were initiated supported by the Unite the Union. At the end of 2013 the bulk of the multiple claims were settled and a new pay regime was implemented. The six present claimants, however, did not compromise their claims, and so they continued to a full merits hearing.

3. That hearing took place at Watford in February 2019 before Employment Judge R Lewis. The six claimants were represented by Mr K McNerney, the respondent by Ms Barsam, both of counsel. In his reserved decision the judge made findings as to which particular allowances that were at issue should, in principle, have been reckoned in to the calculation of holiday pay, for which claimants and in respect of which years. This was subject to what he called "limitation and series" points – that is, points relating to the time limit for bringing such claims. The reasons included the judge's decision on the law relating to such points. The judge envisaged that a remedy hearing would follow at which further issues relating to the determination of each claimant's precise award would be addressed.

4. Live before me were four grounds of challenge on the part of the respondent, three on the part of all six claimants, and one further ground on the part only of one claimant, Mr Ardabili. The hearing of this appeal had previously been delayed or postponed, on account of the impact of the pandemic, ill health of counsel, and to await the outcome of the Supreme Court appeal in **Chief Constable of**

© EAT 2024

the Police Service of Northern Ireland v Agnew [2023] UKSC 22; [2024] ICR 51.

5. At this hearing Ms Barsam of counsel again represented the respondent. Ms Newbegin had, at an earlier stage, been instructed to represent all six claimants. But she now represented four of them: Mrs De Mello, Ms O'Dwyer, Mr Texeira and Mr Ardabili. I had skeleton arguments from both counsel which included their updated submissions in light of **Agnew**. The other two claimants – Mr Duffy and Mrs Kerr – are now litigants in person. Mr Duffy attended the appeal hearing in person and Mrs Kerr joined on the link. They both expressed agreement with Ms Newbegin's submissions and arguments, but they both also relied upon a supplementary skeleton argument that had been put in Mr Duffy, and they both made their own additional oral submissions.

6. At the start of the hearing I considered a number of matters that had been raised by Mr Duffy, on behalf of himself and Mrs Kerr, in the run-up to the hearing. Applications by them to amend the live grounds of appeal, including by reintroducing grounds originally raised in their notices of appeal, but which had not been permitted to proceed to a full hearing, were refused for reasons I gave orally. I also explained that this appeal hearing was solely concerned with consideration of the eight live grounds of challenge to the employment tribunal's 2019 decision; and that the EAT did not have a general power to investigate, or grant relief in relation to, other matters that were concerning them.

7. In discussions at the start of the hearing, a running order and indicative timetable for oral submissions in relation to both the respondent's and the claimants' challenges was agreed. I am grateful to all concerned for their co-operative approach, which enabled the hearing of this matter to be completed over the course of the two days allocated to it.

The Law

8. **Council Directive 2000/79/EC** (the **Air Crew Directive**) gave effect to the so-called European Aviation Agreement, clause 3 of which is materially the same as that of the Article 7 of the **Working Time Directive 2003/88/EC**. Both require Member States to take the measures necessary

© EAT 2024

to ensure that the relevant workers are entitled to paid annual leave of four weeks in accordance with conditions laid down by national legislation or practice. Underpinning these provisions are Articles 31 and 47 of the **EU Charter of Fundamental Rights**, the latter of which provides for the right to an effective remedy in respect of rights and freedoms guaranteed by the law of the Union. It was not in dispute before me that the claimants can continue to rely upon these rights as directly effective, because they began their claims prior to so-called IP completion day on 31 December 2020.

9. Regulation 4 of the **Civil Aviation (Working Time) Regulations 2004** provides:

> **"(1) A crew member is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in respect of a period of employment of less than one year.**
>
> **(2) Leave to which a crew member is entitled under this regulation—**
>
> **(a) may be taken in instalments;**
>
> **(b) may not be replaced by a payment in lieu, except where the crew member's employment is terminated."**

10. Regulation 18 provides, in material part:

> **"18.—(1) A crew member may present a complaint to an employment tribunal that his employer has refused to permit him to exercise any right he has under regulation 4, 5(1), (4), 7(1) or 7(2)(b).**
>
> **(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—**
>
> **(a) before the end of the period of three months beginning with the date on which it is alleged—**
>
> **(i) that the exercise of the right should have been permitted (or in the case of a rest period or annual leave extending over more than one day, the date on which it should have been permitted to begin), or**
>
> **(ii) the payment under regulation 4(2)(b) should have been made;**
>
> **as the case may be; or**
>
> **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."**

11. Claims asserting that an employee has been underpaid in respect of statutory annual leave may be brought pursuant to regulation 18 and as claims for unlawful deduction from wages pursuant to Part II **Employment Rights Act 1996**. It is not disputed that this applies in respect of the **2004**

© EAT 2024

Regulations, just as **HMRC v Stringer** [2009] UKHL 31; [2009] ICR 985 confirms that it applies in respect of the **Working Time Regulations 1998**. This means that the claimants may invoke the time-limit provisions for wages claims set out in section 23 of the **1996 Act**. The starting point in section 23(2) is a three month-time limit from the date of the deduction. But section 23(3) provides, in relevant part, that where a complaint is brought in respect of "a series of deductions", then the reference to "the deduction" is to the last deduction in the series. The present claims pre-date the introduction, in 2015, of a two-year back-stop on the overall period covered by a given claim.

12. Unlike the **Working Time Regulations 1998**, which contain detailed provisions relating to the calculation of pay in respect of periods of leave, the **2004 Regulations** make no such provision.

13. In **British Airways v Williams** (Case C-155/10); [2012] ICR 84 (CJEU) and [2012] UKSC 43; [2012] ICR 1375) (SC) the claimants were British Airways pilots to whom the **2004 Regulations** applied. They received fixed annual basic pay and two variable supplements, being a flying pay supplement (FPS) and a time-away-from-base allowance (TAFB), each calculated at an hourly rate. Questions were referred by the Supreme Court to the CJEU. The particular issues that arose were explained by Lord Mance JSC (for the Court) in the second decision of the Supreme Court. He noted at [5] that "British Airways explains that TAFB was 'introduced to replace meal allowances, sundries and the Gatwick duty allowance' and 'to be increased in accordance with the UK Retail Prices Index for Catering-Restaurant Meals.' The Revenue and Customs' attitude is that the TAFB is over-generous and that 18% of it is taxable, in effect as pure remuneration."

14. As discussed at [7] – [8], when the matter had first reached the Supreme Court, it was of the view that it was likely that the **2024 Regulations** could be construed so as to reflect the meaning of the Directive. On that scenario, British Airways made a submission that "the only constraint imposed by the Directive was that pay during annual leave must not be so low as to prevent or inhibit the taking of leave." It also submitted that the fixed annual basic pay was "sufficiently comparable to

remuneration received while working to satisfy the requirement for paid annual leave."

15. Against that backcloth the questions referred to the CJEU included, after an overview question about the requirements of EU law, the following:

> **"(2) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and workers, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?**
>
> **(3) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's "normal" pay?"**

16. The Advocate General opined at [43] that the case law on the **Working Time Directive** is equally applicable to clause 3 of the European Agreement. In a section concerned with the principles established by the case law in relation to "[c]ontinued payment of remuneration during the period of leave", she went on to consider the judgment in **Robinson Steele v R D Retail Services Limited** (Joined cases C-131/04 and C-257/04); [2006] ICR 932, including the following observation.

> "**In the view of the Court, the purpose of the requirement of payment for annual leave is to put the worker, during such leave, 'in a position which is, as regards remuneration, comparable to periods of work'. In my view, the Court's further findings with respect to the level of holiday pay are sufficiently clear, it having expressly held in paragraph 50 of the judgment in *Robinson-Steele* that the term 'paid annual leave' in Article 7(1) of Directive 93/104 means that, 'for the duration of annual leave within the meaning of the directive, remuneration must be maintained'. Moreover, any remaining doubts as to the interpretation of that sentence should be dispelled by the subsequent clarification ('in other words') to the effect that 'workers must receive their *normal* remuneration for that period of rest'. That clarification must be taken to mean that the level of holiday pay must correspond exactly to that of normal remuneration."**

17. A further section headed: "Conclusion: holiday pay may not be calculated by reference to the minimum subsistence requirement" included the statement at [53] that it would be incompatible with the Court's case-law, if "holiday pay were calculated solely by reference to an amount which is just enough to ensure that the worker is not prevented from exercising his right to paid annual leave", because that would not constitute "maintenance of remuneration", among other problems.

18. In her conclusion, at [90] she said, in part, this:

> **"2) In this regard, holiday pay must, in principle, be determined in such a way as to correspond to the worker's normal remuneration. In any event, an allowance granted as holiday pay will not satisfy the requirements of EU law if it is determined at a level which is just sufficient to ensure that there is no serious risk that the worker will not take his annual leave.**
>
> **3) In a situation such as that in the main proceedings, in which the level of remuneration varies, a worker is entitled to holiday pay corresponding to his average earnings. The calculation of that average remuneration must be based on a sufficiently representative reference period."**

19. The Court concurred that the principles applicable to the **Working Time Directives** were transposable to the European Agreement [16]. It continued, at [20] – [26]:

> **"20 The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work (see *Robinson-Steele and Others*, paragraph 58, and *Schultz-Hoff and Stringer and Others*, paragraph 60).**
>
> **21 As the Advocate General states in point 90 of her Opinion, it follows from the foregoing that remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker. It also follows that an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU law.**
>
> **22 However, where the remuneration received by the worker is composed of several components, the determination of that normal remuneration and, consequently, of the amount to which that worker is entitled during his annual leave requires a specific analysis. Such is the case with regard to the remuneration of an airline pilot as a member of the flight crew of an airline, that remuneration being composed of a fixed annual sum and of variable supplementary payments which are linked to the time spent flying and to the time spent away from base.**
>
> **23 In that regard, although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practice governed by the law of the Member States, that structure cannot affect the worker's right, referred to in paragraph 19 of the present judgment, to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment.**
>
> **24 Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of airline pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave.**
>
> **25 By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away**

> **from base, need not be taken into account in the calculation of the payment to be made during annual leave.**
>
> **26 In that regard, it is for the national court to assess the intrinsic link between the various components which make up the total remuneration of the worker and the performance of the tasks which he is required to carry out under his contract of employment. That assessment must be carried out on the basis of an average over a reference period which is judged to be representative and in the light of the principle established by the case-law cited above, according to which Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right (see *Robinson-Steele and Others*, paragraph 58, and *Schultz-Hoff and Stringer and Others*, paragraph 60).”**

20. The Court concluded at [31]:

> **“In the light of all the foregoing, the answer to the questions referred is that Article 7 of Directive 2003/88 and Clause 3 of the European Agreement must be interpreted as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot. It is for the national court to assess whether the various components comprising that worker's total remuneration meet those criteria.”**

21. When the matter returned to the Supreme Court Lord Mance, for the Court, observed at [9] that the Court of Justice had given a “compendious answer” to the questions posed to it. At [10] he observed that the CJEU's reasoning “makes clear that it was ruling against British Airways on questions (2), (3) and (5)(a)”, citing what the Court has said at [20] and [21] of its judgment. He went on to cite from the succeeding paragraphs that I have set out. He then made this observation at [12]:

> **“The court…drew a distinction relevant to TAFB between, on the one hand, remuneration, including remuneration based on personal or professional status, for all activities whether basic or "inconvenient" undertaken during employment (para 24) and, on the other hand, payments "intended exclusively to cover occasional or ancillary costs" (para 25) – costs which would not of course be incurred during holiday periods.”**

22. Further on, at [18], Lord Mance described how the submission for the pilots was now that holiday pay should include basic pay, FPS and 18% of TAFB, whereas British Airways submitted that the whole of TAFB should be excluded.

23. In a concluding section he went on to hold that HMRC's view was irrelevant, as it was at best

a third party's view "on an issue to be determined independently by the employment tribunal" [28], and, at [30], that British Airways' statement, cited by him at [5], was just its statement of its position; and that "it must be for the employment tribunal to consider and determine upon what basis TAFB was agreed and paid during any relevant period." He then said this:

> **"30. As to the precise test, the concept "intended exclusively to cover … costs" requires attention to be focused on the real basis on which the TAFB payments were made. If they were payments that were made genuinely and exclusively to cover costs, that would, at least prima facie, be the end of the matter. The appellants' case appears to be that, although they were designated as being for the exclusive purpose of covering costs, they were in fact more than some or all pilots might actually need for or spend on costs, and that the Revenue has, in effect, seen through the description to a reality which the Supreme Court, or an employment tribunal, should also recognise.**
>
> **31. As Mr Jeans QC for British Airways accepted, there could no doubt come a point at which it was obvious that payments nominally made to cover costs were not required, or were not going to be required, in their entirety, to match actual costs. An employer who in such circumstances continued to make such payments in their full amount could then no longer maintain that they were genuinely and exclusively intended to cover costs. But, in using the phrase "intended exclusively to cover … costs", it does not appear that the Court of Justice contemplated any detailed evaluation of the precise need for or reasonableness of payments which were so intended. What matters is whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs. It is on that the employment tribunal should in my opinion focus."**

24. The TAFB issues were accordingly remitted to the employment tribunal.

25. In **Lock v British Gas Trading Limited** (Case C-539/12); [2014] ICR 813 the employee was engaged in sales and received a basic salary together with commission on sales received, paid in arrears, and which accounted for more than 60% of his total remuneration. The tribunal referred questions to the CJEU concerning whether the **Working Time Directive** required domestic law to make provision for holiday pay to reflect the commission entitlement, and, if so, in what way.

26. At [19], after a review of the authorities, the Advocate General opined that the purpose of payment during leave "is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work: **Williams**, para 20 and the case law cited." Further on, at [31] – [33], he observed that the commission "does in fact constitute remuneration for the work Mr Lock has carried out himself. The commission is therefore directly linked to the worker's own

work…". Though it fluctuated it was a "constant component of his remuneration" and so an "intrinsic link" did exist between the commission and the performance of his tasks. The Court of Justice, at [20] – [24], adopted this same analysis.

27. In **Dudley Metropolitan Borough Council v Willetts** [2018] ICR 31 (EAT), another **1998 Regulations** case, the issue was whether payments for wholly voluntary overtime should be reckoned part of normal remuneration for holiday pay purposes. They would not have fallen into account under the domestic regime, but as the Directive was directly effective in that case, the issue turned on the meaning of the Directive. That led in turn to a consideration of **Williams** and **Lock** on the basis that the same principles applied to the **Working Time Directive** and the **Air Crew Directive**.

28. Simler P, as she then was, reviewed the opinions of the Advocates General, and decisions of the CJEU, in **Williams** and in **Lock**. She also noted that in **Bear Scotland Limited v Fulton** [2015] ICR 221 the EAT (Langstaff P) had concluded that Article 7 required pay in respect of non-guaranteed (but, where required by the employer, compulsory) overtime to be reckoned in to holiday pay.

29. Simler P described at [31] – [32] how counsel for the employer submitted that **Williams** and **Lock** established that, for a payment to count as part of normal remuneration there must be an intrinsic link between the payment and the performance of tasks that the worker was "required to carry out under his contract of employment." In the instant case, in relation to wholly voluntary overtime, this link was missing. At [33], referring to the submissions of counsel for the employees, she said:

> **"Mr Ford QC submits that the overarching principle is that the purpose of this requirement is to ensure that workers benefit from remuneration comparable to that paid in respect of periods of work; or to put it another way, do not suffer any financial disadvantage as a result of taking annual leave. Because any financial disadvantage may deter a worker (subject to de minimis principles) it is incompatible with the objectives of Article 7 to exclude pay for voluntary overtime from the calculation of pay for Regulation 13 annual leave."**

30. Simler P preferred the employees' counsel's submissions. EU law required "normal (not contractual) remuneration to be maintained. The overarching principle means that payments should

"correspond to the normal remuneration received by the worker" while working. She continued

> **"38. It follows in my judgement, that the CJEU in Williams, having expressly endorsed the conclusion of the Advocate General at paragraph 90.2, did not purport to set a narrower test at paragraph 24 of its judgment that would have the effect of restricting the application of the overarching principle.**
>
> **39. Having set out the overarching principle, the CJEU made clear that the division of pay into different elements cannot affect a worker's right to receive "normal remuneration" in respect of annual leave. In each case the relevant element of pay must be assessed in light of the overarching principle and objective of Article 7 which is to maintain normal remuneration so that holiday pay corresponds to (and is not simply broadly comparable to) remuneration while working (paragraphs 22 and 23).**
>
> **40. Further, for a payment to count as "normal" it must have been paid over a sufficient period of time. This will be a question of fact and degree. Items which are not usually paid or are exceptional do not count for these purposes. But items that are usually paid and regular across time may do so."**

31. Accordingly, the tribunal had not erred in considering that voluntary overtime pay "if sufficiently regular and settled" would form part of normal remuneration.

32. In **Flowers v East of England Ambulance Service NHS Trust** [2019] EWCA Civ 947; [2019] ICR 1454 the Court of Appeal upheld a decision of the EAT that Article 7 required holiday pay to include both non-guaranteed and voluntary overtime. Bean LJ, after reviewing the authorities, was disposed simply to adopt Simler P's analysis in **Willetts**. However, consideration was needed of a more recent decision of the CJEU in **Hein v Albert Hozkamm GmbH & Co Kg** (Case C-385/17); [2019] 2 CMLR 19 which contained a passage which, it was contended, meant that overtime would not fall to be taken into account if it was not compulsory. But ultimately he concluded that the Court had not contradicted what it had said in **Williams**. Accordingly **Willetts** was correctly decided. Asplin LJ gave a concurring judgment and Nicola Davies LJ agreed with both the other judgments. Although **Hein** was cited in her skeleton argument, Ms Barsam indicated in oral submissions that, in light of **Flowers**, she did not rely upon it. So I do not need to see anything more about it.

The Tribunal's Decision – General Principles

33. Having heard argument by reference to the foregoing authorities in particular, the tribunal set

© EAT 2024

out a number of principles that it drew from them:

> **"66. The question for me is whether, in law, and on what basis, each of the allowances in play in this case (a total of 29 within the respondent's systems, although I am not called upon to make decisions about all of them) are pay for the purposes of CAWTR. I take the following points of general principle: -**
>
> **66.1 The right to paid leave is a matter of fundamental importance of EU law;**
>
> **66.2 Holiday pay should be calculated in a way to make sure, so far as possible, that the worker is not deterred from exercising a right to paid leave by reason of any financial disadvantage which might be suffered;**
>
> **66.3 The level of holiday pay should therefore correspond to normal remuneration;**
>
> **66.4 What is normal may be decided by taking a representative averaging approach;**
>
> **66.5 That approach is more likely to include payments which are broadly regular in a temporal sense (Ms Barsam suggested payments every four to five weeks as an instance of regularity);**
>
> **66.6 It may also include payments which represent a form of pattern and regularity, excluding exceptional contingencies;**
>
> **66.7 An intrinsic link between payments and performance of the contractual tasks is critical (decisive, in the word of the EAT in Dudley);**
>
> **66.8 Ms Barsam submits that the EAT is wrong in Dudley to state that intrinsic link is a sufficient criterion, and submits that it is necessary, but it is also to be linked to payment "with sufficient regularity to constitute normal remuneration". That submission is recorded here, but is not for me to decide.**
>
> **66.9 Certain payments are excluded, such as (quoting the Advocate General in Williams, cited in Dudley): "Components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance";**
>
> **66.10 The assessment by the tribunal must be carried out on the basis of an average over a representative reference period, agreed in this case to be the period of one year starting 1st April in the year preceding payment."**

34. The tribunal went on at [67] to add some "general findings", including the following:

> **"67.1 The burden of proof rests on each claimant individually to show that each allowance is part of his or her normal pay;**
>
> **67.2 A judgment or concession as to whether an individual allowance is capable in principle of being normal pay does not determine each claimant's claim for that element of pay, at all, or in any stated period;**
>
> **67.3 The perception of the claimants, no matter how honest, is not a satisfactory criterion: the assessment of what is normal, or regular, is an objective matter for the tribunal.**

© EAT 2024

> …
>
> **67.8 Discussion about meal allowances led Ms Barsam to stress, more than once, the importance of the tribunal focussing on intention not effect. While that correctly states the law indicated by the CJEU, I accept that it is also something of an artificial construct to examine the intention of a corporation in introducing an allowance which goes back to the 1960s (if not before). I accept the point of principle, which is to be sure to understand intention and effect separately. In the same context, there was reference to the involvement and view of HMRC, on which Ms Barsam referred me to the judgment of the Supreme Court in Williams, that that was the view of an independent third party considering matters which were not before the tribunal.**
>
> **67.9 The only submission on proportionality was advanced by Ms Barsam in relation to commission payments. I deal with the point in the specific context of commission.**
>
> …
>
> **67.11 [A common sense point is] the flat rate point. I accept that faced with the choice between paying cabin crew a fixed flat rate sum for a particular item, or verifying claims and receipts (potentially for thousands of items each day), BA management, in the exercise of its discretion, took the reasonable choice of the former. It was reasonable to operate a flat-rate system, which may prove more generous than reimbursement, if the alternative (receipt-based reimbursement) would be disproportionate and burdensome in work, and potentially damaging to goodwill and morale."**

The Respondent's Appeal – Meal Allowances

Meal Allowances – the tribunal's decision

35. The respondent's four grounds of appeal all relate to the tribunal's conclusion that meal allowances are in principle to be included for the purposes of calculating statutory holiday pay. I will set out in full the relevant passage in the tribunal's decision:

> **"70. The discussion of meal allowances had areas of common ground as well as areas of dispute.**
>
> **71. An entitlement to meal allowance is triggered when a member of cabin crew is on duty at any mealtime. The trigger is being on duty at the time, not eating the meal. The relevant time may be any of the base time, or the destination time, or the time according to the location of the employee. Ms Kerr submitted that time differences could trigger two allowances for the same meal.**
>
> **72. The trigger time may occur at a time when the employee is unable to spend money on a meal, eg if on board a flight, or during a turnaround when there is insufficient time to leave the aircraft. The allowance is nevertheless payable.**
>
> **73. The allowance is payable even though food for crew is always available on board, or if the member of cabin crew has brought their own food on board (as I was told was not unusual in practice).**
>
> **74. The meal allowance is also payable in respect of meal times during rest at an**

© EAT 2024

overseas location. A long-haul flight involves, for example, two nights in a hotel at the destination, and the meal allowances are triggered according to the local time at the crew hotel.

75. The allowances are fixed, flat-rate amounts. They are reassessed each year with reference to worldwide consumer price data from the IMF, and overseas rates are set, not for a country but for a destination, so that different destinations in the same country may have different rates. Meal allowances were frozen between 2008 and 2012. Meal allowances were not within CFP, and although inclusion within CFP does not seem to me a matter of great importance, exclusion from CFP for the stated reason, that the element is not pay but is subsistence, is a factor for consideration.

76. Meal allowances are set by the respondent for overseas destinations in consultation with the unions, and by reviewing the cost of meals in the hotel used by Cabin Crew when overseas. The formula for calculation is for a generous full meal, described as including, for example, a seven-course dinner. The respondent reviews these rates from time to time to ensure that they maintain their value, as costs may change according to the value of currency, and similar factors. The process is undertaken by consideration of menus, and the same processes are initiated when, for example, the respondent initiates a new long-haul route and selects a crew hotel.

77. The respondent does not, at any time, require an employee to produce a receipt or proof of having spent the allowance on food. It is perfectly open to an employee to be paid the overseas rate for a seven-course dinner, and make other arrangements for his or her meal.

78. HMRC does check crew members' receipts on a random basis, and I understand that Cabin Crew are advised by the respondent to keep receipts for overseas meals. There has been a protracted process by which HMRC reviews payments, and assesses a percentage of them to tax, on the basis that the HMRC assessment is that a particular proportion of the meal allowance is an emolument from employment which is liable to tax. The 2009 HMRC audit set the taxable proportions as 35% for WWF and 46% for EF.

79. Ms Barsam's submission was that the tribunal must attach no weight at all to the effect of meal allowance. In other words, if I find that it contains an element of windfall (which seems inescapable) that should attract far less weight than might appear. She attached particular weight to the language of the CJEU in Williams, quoted by the Supreme Court (paragraph 11 of the latter, incorporating paragraph 25 of the former): "The components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the task which the worker is required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave"

80. It was perhaps with reference to the emphasised words (emphasis added) that Ms Kerr wrote: "Meal allowance was historically introduced as a cost-effective way for both the company and the crew to have an increase in pay. There would be savings to both the employee and BA via the tax regime."

81. Mr Ayres gave evidence that the meal allowance arrangement was negotiated with the unions in the 1970s, has not changed, and that reforming it is one of the things that "are best left undone". In his witness statement he wrote that meal allowance was "introduced to pay for food and drink while staying in hotels down route or away from home."

82. A glance at the agreed schedules shows, not surprisingly, that meal allowance was paid apparently to every claimant for every month within the period of this case. That is hardly surprising: given the length of a working day, it would be inconceivable that any claimant worked a rostered day as crew without triggering at least one meal allowance. Clearly, the allowances meet any test of regularity and pattern. I accept that they are intrinsically linked to performance of duties, because without having eaten the meal, Cabin Crew could not perform their work, or perform it to a satisfactory standard of passenger safety and service.

83. In setting the meal allowances, the respondent, in its own word, has been generous. Faced with a choice between generosity, versus staff working hungry, it has erred on the side of generosity. It cannot be faulted for doing so. It has done so accepting that a receipt based reimbursement scheme would be hugely burdensome to operate, and would generate administrative work and ill will in equal measure. It is in keeping with BA's own rationale and logic that meal allowance has been excluded from CFP, because flying duties, and payment for them, are not affected by the requirement that crew have the opportunity to eat at meal times.

84. I find real difficulty in the quoted language of the CJEU above. Individual intention is difficult enough for a judge to gauge, let alone the intention of a long-established corporation. As Ms Barsam rightly pointed out, none of the claimants is in a position to know what British Airways intended. The intention of meal allowances (whenever they were introduced) may have been one thing in the past, but may have changed or developed. It is, in theory, perfectly possible that meal allowances were introduced with the exclusive intention of reimbursing costs at a generous level, but with the passage of time, retaining them has accrued the additional intention of (as the claimants asserted) topping up basic pay; and (as Mr Ayres hinted) keeping a quiet industrial life.

85. The Supreme Court in Williams went on to deal further with the TAFB element of pilots' pay (emphases added):

> **"The claimants submit that the Supreme Court can and should without more conclude that the pilot's remuneration includes 18% of the sums paid by way of TAFB. But the 18% is no more than the percentage which HMRC regards as taxable. The revenue's attitude for tax purposes is presently irrelevant. It amounts at best to a third party's view on an issue to be determined independently by the Employment Tribunal. Even if the Revenue's attitude for tax purposes were relevant, it is not in any event clear on what basis the Revenue arrived at its attitude, or by refence to what consideration.**
>
> **In contrast, BA relies upon the test stated by the Court of Justice, which excludes from remuneration relevant to the calculation of holiday pay, components of pay "which are intended exclusively to cover costs." BA stresses the words "intended" within such components the Court of Justice expressly included "costs connected with the time that Pilots have to spend away from base". … It must be for the Employment Tribunal to consider and determine upon what basis TAFB was agreed and paid during any relevant period." As to the precise test, the concept "intended exclusively to cover costs" requires attention to be focussed on <u>the real basis on which the TAFB payments were made</u>. If they were payments that were made genuinely and exclusively to cover costs, that would, at least prima facie, be the end of the matter. The claimants' case appears to be that, although they were designated as being for the exclusive purpose of covering costs, they were in fact more than some or all Pilots might actually need for, or spend on, costs, and that the revenue has, in effect, seen**

© EAT 2024

> **through the description to a reality which the Supreme Court, or an Employment Tribunal, should also recognise.**
>
> **As Counsel for BA accepted, there could be no doubt, a point at which it was obvious that payments nominally made to cover costs were not going to be required, in their entirety, to match actual costs. An employer who in such circumstances continued to make such payments in their full amount could then no longer maintain that they were genuinely and exclusively intended to cover costs. But, in using the phrase "intended exclusively to cover costs", it does not appear that the Court of Justice contemplated any detailed evaluation of the precise need for or reasonableness for payments which were so intended. What matters is whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs. It is on that the Employment Tribunal should, in my opinion, focus. On this basis, I would also remit the issues relating to TAFB to the Employment Tribunal…"**

> **86. Applying that reasoning and approach, I add that it seems to me self-evident that the burden of proving exclusive intent rests on the party who asserts it, which in this case (as probably in every other case) is bound to be the respondent. I find that it has failed to discharge that burden.**
>
> **87. I conclude therefore that meal allowances in principle are included within the allowances which are to be considered as part of pay for holiday pay purposes.**
>
> **88. I have not heard submission on the precise question of whether the whole meal allowance is to be taken into account; or, if not, what proportion and how it is to be calculated. I consider that those points must be adjourned to a further hearing. The precise arrangements for managing that hearing (which in my view can in principle be conducted by written submissions) are for further discussion (unless agreed between the parties). I formulate the question as follows, although I do so as an invitation for counsels' comments: "Given the finding that meal allowance is, in principle, to be counted as pay in the calculation of CAWTR pay, what is the correct approach by which the relevant calculation to be made?"**

The Grounds of Appeal

36. The headline challenges raised by the four grounds of appeal are in summary as follows.

37. Ground 1 contends that the tribunal applied the wrong legal test. In particular it contends that the test set out by the Court of Justice in **Williams** is that components of remuneration which are intended exclusively to cover occasional or ancillary costs do not need to be taken into account in the calculation of holiday pay. This required the tribunal to focus on the genuine *intention* of the respondent. However, it is said that the tribunal failed to do so, and instead focussed on the potential *effect* of meal allowances and the need for, or reasonableness of, the payments, including erring by giving substantial weight to the "generous" effect of the allowance.

© EAT 2024

38. Ground 2 contends that the tribunal erred in relation to the burden of the proof. The onus was on the claimants to show that meal allowances should be counted as part of normal pay and hence holiday pay. Instead the tribunal erred, it is said, by requiring the respondent to prove that meal allowances were intended exclusively to cover costs, and so were not part of normal pay.

39. Ground 3 contends that the tribunal failed to give adequate reasons. In particular it refers to the evidence of one of the respondent's witnesses, Mr Ayres, that meal allowances were paid to reimburse subsistence costs. It asserts that the tribunal did not explain whether it rejected that evidence, or, if it did, why. The ground also lists a number of factual findings said to have been supportive of the respondent's case. It is said that, in light of those findings, and if the burden did fall on the respondent, it is unable to understand on what basis it was found not to have discharged it.

40. Ground 4 contends that the tribunal ignored relevant evidence and took into account irrelevant evidence in relation to meal allowances. Particular features of the evidence are identified.

Discussion and conclusions

41. The jurisprudence of the Court of Justice establishes that the overriding principle is that holiday pay must reflect normal pay. There are then two components to the test of whether a given type of payment or allowance forms part of normal pay. The first relates to what I will call the nature of the payment and the second is what the EAT in **Willetts** at [20] called a temporal component.

42. As to the first component, the general test propounded by the Advocates General, and adopted by the Court of Justice, in the foregoing authorities, is that the payment will be of the requisite nature if it is "intrinsically linked to the performance of the tasks which the worker is required to carry out under his contract of employment". **Willetts** explains that the key test is whether the payment is in fact linked to the "performance of the tasks", so that it does not matter whether the activity which triggered the payment was originally mandated by the contract of employment or was something

© EAT 2024

(such as voluntary overtime) that the employee agreed to do ad hoc.

43. The discussion in **Willetts** postulates that there are two ways in which the jurisprudence of the Court of Justice can be read in this regard. One (preferred by Simler P) draws on the fact that the Court noted that it was also established in earlier authorities that what it calls compendiously payments relating to "professional status" are also included in holiday pay. Simler P postulated that this demonstrates that, while meeting the test of being "linked intrinsically to the performance of the tasks" is sufficient, there are other routes by which the component relating to the nature of the payment could be satisfied. The alternative analysis, discussed at [46], is that the "intrinsic link" test is in fact satisfied by the carrying out of voluntary overtime, because the duties or tasks carried out are in either case the same, and, even if ad hoc, are still performed under the umbrella of the contract.

44. Either way, it seems to me that the underlying rationale – which is that holiday pay should reflect normal pay – is to be treated as satisfied if the payment concerned is compensation for performing the duties or tasks of the job, so long as the temporal test is also satisfied. Thus, in **Lock** at [32] the Court said: "In the case in the main proceedings, as the Advocate General's Opinion, the commission received by Mr Lock is directly linked to his work within the company. *Consequently* [my emphasis] there is an intrinsic link between the commission received each month by Mr Lock and the performance of the tasks he is required to carry out under his contract of employment." This underlying rationale also, I am inclined to think, explains why what the Court calls "professional status" payments satisfy what I have called the nature test. These are payments triggered by factors which are thought to justify some additional or higher reward *for doing the job*.

45. Paragraphs [24] and [25] of the Court of Justice's decision in **Williams** must be read as a whole. As the opening words of [25] – "By contrast" – indicate, the Court was identifying a principled distinction between two scenarios. Either the payment is "linked intrinsically to the performance of the tasks", or it is not, but is, instead, a payment in respect of "costs", which "need not be taken into

account." But, the general test stated in the answer given by the Court, at [31], was simply that the pilot is entitled to "all the components intrinsically linked to the performance of the tasks".

46. Thus when the matter returned to the Supreme Court, Lord Mance identified at [12] that the Court of Justice had drawn a distinction between "on the one hand" remuneration for all activities undertaken during employment, and, "on the other hand" payments to cover occasional or ancillary costs. The passage beginning at [28] of his speech then took up the specific issue relating to TAFB. In the first sentence of [30] he formulated the test as requiring attention to be focussed on "the real basis on which the TAFB payments were made" and whether they were "made genuinely and exclusively to cover costs". The discussion at [31] indicates that the answer will not turn on a detailed analysis of whether the payment is set at a level which is needed or reasonable; but nevertheless there may be cases where the payment is so high, that this fact is treated as undermining the employer's case that the payment was genuinely and exclusively intended to cover costs.

47. Two salient points emerge. The first is that there is a single issue for the tribunal in such cases. What is the real basis of the payment? Is it a performance payment or was it made genuinely and exclusively to cover costs? The second is that the Court of Justice, and, following it, the Supreme Court, eschew the approach taken by HMRC to such issues, of hypothecating a percentage or proportion of such an allowance as being a performance payment and a percentage or proportion as being an expenses payment, by making some general assessment or adjudication of what would be a reasonable amount to allow. Rather, either the payment is one side of the line, or it is the other.

48. As to the burden, the overall position is that this is on the worker who asserts that a payment forms part of normal pay to show that it does. But, as so often, the tribunal is unlikely to need to resort to the burden of proof to decide the issue. Whether the payment is a performance payment or an expenses payment should be decided by the tribunal by identifying all the relevant facts and circumstances (from whichever source the evidence came), and then standing back and assessing the

© EAT 2024

overall picture, including by drawing appropriate reasoned inferences from the primary facts, in order to decide which side of the line the given payment falls. The worker will no doubt highlight those features argued to support the conclusion that it is a performance payment, and the employer those argued to support the conclusion that it is an expenses payment; but the tribunal's task is to weigh and assess the overall picture painted by *all* the relevant facts and circumstances.

49. Lord Mance's observation at [31] should be seen in this context. The fact that a payment is in a fixed amount is not as such fatal to the conclusion that it is an expenses payment. But if, in the given case, it is at a very high level that is "obviously" not wholly required to cover expenses, that may be treated as decisively tipping the scales in favour of the conclusion that the real basis on which it has been made is that it is a performance payment. But I note that the answer in such a case is not for the tribunal to split or apportion the payment. Rather, the employer may avoid this conclusion by bringing the level of the payment down below such a very high level.

50. I turn, then, to the respondent's challenges to the present tribunal's conclusion in relation to meal allowances. I have already set out the relevant passage in the decision at [70] – [88].

51. Paragraphs [71] to [78] are the material findings of fact. Paragraph [79] refers to a submission to which the tribunal is going to return. Paragraphs [80] and [81] refer to evidence, which, it may be inferred, the tribunal accepted, in so far as it was evidence of fact, as opposed to comment. The first part of paragraph [82] is, I think, directed clearly to the temporal component of the test, and unsurprisingly concludes that this was met in relation to these allowances.

52. Then the tribunal comes to its final conclusions. These are plainly guided by its earlier self-direction as to the law. At [66.7] it directed itself that, for an allowance to count towards normal pay, an intrinsic link to performance is critical. But it went on at [66.9] to postulate that certain payments are "excluded", such as allowances "intended to cover occasional or ancillary costs arising at the time of performance." Thus the tribunal appears to have regarded payments of the second kind as forming

© EAT 2024

an excluded subset of payments of the first kind. This appears to me to be why it did not regard its conclusion at [82], that meal allowances were intrinsically linked to the performance of duties, as determinative, and went on also to consider whether they fell within what it regarded as the occasional-or-ancillary-costs exclusion. This is also why, although its overall starting point at [67.1] was that the burden of proof "rests on each claimant individually to show that each allowance is part of his or her normal pay", it considered that the burden of proof fell on the respondent to show that meal allowances fell within what it regarded as the "exclusion" from performance payments.

53. The first part of [83] appears to indicate that the tribunal considered that the mere fact that the payment was set at a generous level would not preclude such a finding. Paragraph [84] poses a problem, and paragraph [85] cites what the tribunal understands to be the particular test it should be applying, but neither contains any dispositive reasoning. Paragraph [86] and [87] then state the tribunal's conclusion that meal allowances are "in principle" included because the respondent has failed to discharge the burden on it. Paragraph [88] then indicates that the tribunal considers that a further and final step is required, being to determine whether the whole of the meal allowance is to be taken into account, or, if not, what proportion.

54. It seems to me that the tribunal did fall into error, by proceeding from the analysis that expenses payments are an excluded sub-category of performance payments, to the reasoning that the burden of proof was on the respondent to show that these payments were expenses payments, and then to deciding the issue on the basis that the respondent had failed to discharge that burden. Overall, respectfully, the tribunal's approach was too rigid and compartmentalised. As I have described, the tribunal's task was to weigh all the relevant facts and circumstances, in order to decide which side of the line these particular allowances fell. In particular, when considering whether the payments were intended exclusively to cover expenses, the tribunal was not confined to considering evidence, such as it was, coming from the respondent's witnesses, as to what was in the minds of those involved in the creation or maintenance of the scheme. Rather, it could and should have considered what proper

© EAT 2024

inference could be drawn from the *overall* constellation of relevant facts, including other factual features that might be said to support a proper inference in relation to that question, and from wherever the evidence in support of those facts came.

55. Ms Newbegin reminded me, of course, of the familiar and long-established guidance in the authorities, such as in this passage in **RSPB v Croucher** [1984] ICR 604 at 609G – 610A:

> **"… decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and … what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not …"**

56. However, in the present case, the tribunal made a principled error in its approach to how it determined the issue. While it set out relevant findings of fact at [71] to [78], because of the approach that it took, which led it to dispose of the issue on the basis that the respondent had failed to discharge the burden on it, it failed to engage in the process of weighing and assessing the overall picture painted by the factual mosaic, in order to decide on which side of the line these allowances fell. There were plainly a number of those factual features that the claimants contended supported their analysis, and a number that the respondents contended supported their analysis. But because of the way that it approach and determined the issue, the tribunal failed to engage in a substantive assessment of these.

57. Ms Newbegin highlighted the tribunal's observation at [79] "…if I find that it contains an element of windfall (which seems inescapable)". She submitted that the words in brackets showed that the tribunal considered that this case fell into Lord Mance's category at [31] of cases where it was "obvious" that the payments were not going to be required, in their entirety, to match actual costs, so rendering untenable the respondent's contention that they were genuinely and exclusively intended to cover costs.

58. However, there is no express reasoning or finding in this decision to that effect; and I do not

think that it can be inferred that this was the reasoning which led the tribunal to its conclusion. Apart from the fact that, if this was what the tribunal concluded, it could have been expected expressly to say so, there are the following further difficulties. First, I agree with Ms Barsam that the observation, as such, that the meal allowance contains "an element of windfall" does not, in itself, point to that conclusion, particular given that it is clear that the fact that an allowance is in a fixed amount does not, in itself, necessarily preclude it from being treated as an expense allowance. Secondly, in its dispositive reasoning the tribunal seemed to take on board that very point at [83].

59. Thirdly, the sense of what Lord Mance says in the opening words of [31] is that one could not preclude there being an extreme case of the type described in the first two sentences, where the result would be obvious. But the sense is that the possibility of there being such cases is not reflective of the general approach to be taken, which is then set out in the remainder of that paragraph. If the present tribunal considered that this case indeed fell into that exceptional category, this is a further reason why it needed to spell it out. Further, while the tribunal set out, at [85], extracts from [28] – [31] of Lord Mance's speech, highlighting certain passages, it did not highlight this particular passage. Finally, it seems clear, to repeat, that the tribunal ultimately decided the matter simply on the basis of the application of the approach that it took to the burden of proof.

60. For the foregoing reasons I uphold ground 2 and will allow the respondent's appeal. I have noted that, in the grounds of appeal, the respondent highlights certain features of the facts or evidence that it contends were necessarily relevant or irrelevant, or particularly compelling. But it will be for the tribunal to make that assessment for itself. I cannot rule out, for example, that a feature relating to what the respondent characterises as the effect of meal allowances might be considered by the tribunal to contribute something to what it can infer was the "real basis" on which they were paid. It will also not be necessary for the tribunal to comment in its conclusions on every last factual feature to which either party attached significance, so long as it explains which features it regarded as particularly significant, and how it came to its overall assessment of them and conclusion.

© EAT 2024

61. Before leaving the respondent's appeal, however, there is one further aspect that needs to be addressed. This concerns the conclusion at [87] that meal allowance is "in principle" included in holiday pay but, at [88], that whether the whole, or what proportion, of it is to be taken into account must then be determined. At [25] the tribunal indicated that this was a matter on which there needed to be further submissions, at a further remedy hearing. This suggests that the tribunal did consider that some further exercise was required to evaluate whether the full amount of the payment was reasonably required to cover the cost of a meal, or only some designated proportion of it. If so, that would be the very thing that the Supreme Court indicated it should not be drawn into.

62. Accordingly, I allow the respondent's appeal; and the question of whether meal allowances did or did not form part of normal pay must be remitted to the tribunal for fresh determination.

The Claimants' Appeals / Cross-Appeals

The Grounds

63. There are four grounds of appeal or cross-appeal from the claimants, the first three raised by all six of them, and the last one by Mr Ardabili only. I will stick with the ground numbers that they have inherited from how matters unfolded on the way to the full appeal hearing: 4, 5, 8 and 9.

64. Ground 4 contends that the tribunal erred in concluding that the respondent was in law entitled to, and did, designate the first 20 or 28 days of a given holiday year as statutory (as opposed to contractual) leave days; alternatively that decision was perverse. Particulars of perversity are given.

65. Ground 5 contends that the tribunal erred by interpreting a "series" for the purposes of section 23(3) of the **1996 Act** as being broken where the time gap between two deductions was more than three months. There is a further issue as to the precise scope of this ground, to which I will come.

66. Ground 8 challenges the tribunal's conclusion that commission on duty free sales should not count as part of normal pay, as it was highly unlikely that not including it would have any deterrent

© EAT 2024

effect on an employee taking annual leave. That is said to be inconsistent with the reasoning of the CJEU as adopted by the Supreme Court in **Williams** [2012] UKSC 43; [2012] ICR 1375.

67. Ground 9 contends that the tribunal erred in concluding that so-called Back-2-Back allowance should not count as part of normal pay for Mr Ardabili for the reference year 2008-2009, by failing to disregard the fact that for the first seven months of that year he was not entitled to that allowance.

Ground 5 – Series of Deductions

68. It is convenient to start with ground 5.

69. The tribunal, at [39.3], considered itself bound by the decision of the EAT in **Bear Scotland v Fulton** [2015] ICR 221, that a gap between two successive deductions of more than three months would break the series. Subsequently, in **Agnew** the Supreme Court ((Lord Kitchin and Lady Rose, the other Justices concurring) held that this was an error, and that there is no such principle.

70. Doctrinally, by virtue of section 41(2) **Constitutional Reform Act 2005**, **Agnew**, which is a decision of the Supreme Court on appeal from the Northern Ireland Court of Appeal (NICA), is to be regarded as a decision of a court of Northern Ireland. However Ms Barsam sensibly indicated that she accepted that, one way or another, in light of **Agnew** I should not regard myself as bound to follow **Bear Scotland**, and should instead treat **Agnew** as an authoritative statement of the correct position on the point in respect of section 23 of the **1996 Act** (to which the decision makes copious reference). Ms Barsam therefore accepted that I should hold that (though it was bound to follow **Bear Scotland** at the time) the present tribunal had erred in applying what I will call a three-month rule.

71. Ms Newbegin submitted that, in light of **Agnew**, not only must the tribunal's conclusion at [39.3] accordingly fall, but also its conclusion at [39.4], that "[t]his approach applies to each claimant's claim for each allowance separately". It also followed, she contended, that the matter should return to the tribunal on the basis that, as there was no "three-month rule", and as all of the

© EAT 2024

deductions which the claimants claimed were deductions from holiday pay, all of the occasions in respect of which the tribunal concluded that a given claimant had not received the proper amount of holiday pay should be treated as part of an unbroken series.

72. Ms Barsam submitted that ground 5, as framed, was confined to a challenge to the tribunal's conclusion at [39.3], not its conclusion at [39.4]; and in any event [39.4] was not wrong. While it has now been held that there is no three-month rule, whether two or more payments form part of a single series is a fact-sensitive matter in each case. Ms Barsam accepted that the authorities establish that two successive deductions do not have to be "contiguous" to form part of a series – that is they do not have to be from immediately consecutive wage payments, and the chain will not be broken by intervening lawful payments, as such. Nevertheless, she argued, it is for the appreciation of the tribunal whether two deductions are sufficiently similar in subject matter to enable them to be regarded as part of the same series. There is no rule of law that, if two deductions are both from holiday pay, that alone means that they must necessarily be sufficiently similar in that sense.

73. My conclusions on these points follow.

74. As to whether the challenge to [39.4] is within scope of ground 5, true it is that the wording of the ground simply refers to the tribunal having erred in holding that there is not a "series" where the gap between two deductions is more than three months. However, the tribunal's decision at [39.4] is at best ambiguous. The conclusion that "[t]his approach" applies to the claim for each allowance separately, must mean that the "approach" just referred to in [39.3] applies in that way, being the approach that a series of deductions is broken by a gap of more than three months. There is no statement here that the tribunal would have considered that the question of whether there was a series should have been approached allowance by allowance, even had there been no "three-month rule".

75. In any event, if to advance this argument requires permission to amend, I grant it. While Ms Barsam criticised the claimants for not raising the point sooner, Ms Newbegin pointed out that it did

feature in her written skeleton argument when this appeal was due to be heard in 2022, though I observe that that is not the same as an application to amend. Further, the relisting of this appeal was ultimately put off until the Supreme Court's decision in **Agnew** was known, and it is now the latest word on the subject of the meaning of "series" in general. Further, it is highly desirable that this point be addressed now, before this long-running litigation returns to the tribunal. Finally, Ms Barsam acknowledged that she was in a position to argue the merits of the point, and indeed did so.

76. I turn, then, to the substantive issue.

77. In **Group 4 Nightspeed v Gilbert** [1997] IRLR 398 (EAT) the claim related to a number of occasions on which it was said that there had been a deduction by failing to pay commission. At [17] the EAT said that the claims "formed a series by virtue of their connection to the same contract, the same commission scheme … [and the fact that] they had the same connection in subject matter, namely disputed commission payments. … In our judgment, the fact that there were various different reasons why in the case of each deduction the appellants declined to pay cannot alter the fact that, for jurisdictional purposes, the claims were being made in respect of a series of deductions."

78. In **Bear Scotland** the EAT said at [79]:

> **"Whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject matter, such that each event is factually linked with the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link."**

79. The EAT's reasoning on that point survives **Agnew** and indeed was described by the Supreme Court at [121] as "unimpeachable". Further on, the Supreme Court said:

> **"127. Secondly, we agree with the Court of Appeal that the word "series" is an ordinary English word and that, broadly speaking, it means a number of things of a kind, and in this context, a number of things of a kind which follow each other in time. Hence, whether a claim in respect of two or more deductions constitutes a claim in respect of a series of deductions is essentially a question of fact, and in answering that**

© EAT 2024

question all relevant circumstances must be taken into account, including, in relation to the deductions in issue: their similarities and differences; their frequency, size and impact; how they came to be made and applied; what links them together, and all other relevant circumstances.

128. Thirdly, we also agree with the Court of Appeal that a contiguous sequence of deductions of a particular kind is not a requirement of a series, though it may be a relevant factor in deciding whether the deductions constitute a series. That is not to say that deductions which do follow each other in time necessarily constitute a series; nor does it mean that a series of unlawful deductions remains intact when they are interrupted by a lawful payment. All will depend on the nature and reason for the deductions of which complaint is made, and whether and, if so, how any lawful payment has anything to do with them.

129. Fourthly, it is helpful and important to identify the alleged series of unlawful deductions upon which reliance is placed and the fault which is said to underpin it. In these appeals, the series is a series of deductions in relation to holiday pay. Each unlawful deduction is said to be factually linked to its predecessor by the common fault or unifying vice that holiday pay was calculated by reference to basic pay rather than normal pay, and so regardless of any overtime or allowances during the reference period. As the Court of Appeal observed, there would have been appropriate payments of pay between the holiday payments while the claimants were at work which would not have been subject to unlawful deductions. But identifying the alleged series as a series of deductions in relation to holiday pay meant those lawful payments whilst the claimants were at work did not of themselves interrupt the series.

130. More specifically, we are also satisfied that the Court of Appeal made no error in finding:

(i) that each unlawful deduction in relation to holiday pay was factually linked to its predecessor by the common fault or unifying vice that holiday pay was calculated by reference to basic pay rather than normal pay;

(ii) this method of calculation linked all payments of holiday pay, and it did so consistently from 23 November 1998;

(iii) it mattered not that the interval between these payments was from time to time in excess of three months; and these intervals of more than three months did not, in and of themselves and as a matter of law, break the series or bring it to an end; and further,

(iv) the series was not broken or brought to an end by any correct and lawful payment of holiday pay in so far as that payment came about (in common with the other payments in the series) by virtue of the application of the common fault or vice that holiday pay was calculated by reference to basic pay rather than normal pay. In these cases, each payment was still linked to its predecessor by the common fault or vice that holiday pay was calculated by reference to basic pay rather than normal pay."

80. As I have indicated, it appears to me that the present tribunal's conclusion at [39.4] was parasitical upon its conclusion at [39.3] and in any event does not appear to have been reached by an application of the principles that these authorities set out. It therefore cannot stand. What is the

© EAT 2024

consequence? It is certainly clear, at least, that it would be open to the tribunal in this case, when considering whether there was sufficient similarity of subject matter between the impugned deductions, to hold that there was, because they were linked by the common fault or vice that holiday pay was not calculated by reference to normal pay, and that this was so, even though the particular allowances which might count as part of normal pay for the purposes of the holiday pay calculation, might, for a given claimant, vary as between different particular occasions.

81. Can, or should, I go further, and substitute a decision to that effect? I am mindful of the fact that the authorities emphasise that whether the "sufficient similarity" and "temporal" aspects of the concept of series are satisfied in the given case is a question of fact for the employment tribunal. However, importantly, the Supreme Court in **Agnew** noted, at [87], that "a purpose of this scheme is to protect workers, some of whom may be vulnerable", and, at [90], that the broad purpose of the series of deductions provisions is "to provide a measure of protection against the operation of the short limitation period". At [112] it said: "An important general purpose of the legislation we are concerned with in this appeal is to give workers a measure of protection from exploitation and, as Lord Leggatt explained in **Uber BV v Aslam** [2021] UKSC 5, [2021] ICR 657, para 71, it is, among other things, to protect vulnerable workers from being paid too little for the work that they do."

82. In that context, it is significant that the test set out in **Bear Scotland**, approved by the Supreme Court (and indeed by the NICA in that case, which it upheld), is one of "sufficient" similarity. While the question is, in a given case, one of fact, I conclude that the proper approach for the tribunal to take to the facts found in a given case, is that, if, at a particular level of abstraction, there are similar features of the deductions, such that they would meet the test of similarity for these purposes, then it should conclude that there *is* sufficient similarity, notwithstanding that, if it descended to a more granular level of factual analysis, differences of factual detail might be detected. That approach serves the statutory purpose, and provides tribunals with a firmer footing for the exercise of evaluation of the facts in the given case that it is for them to carry out.

© EAT 2024

83. In the present case the undisputed and found facts are that all of the payments from which the claimants claim that there were unlawful deductions were of holiday pay, and in all cases they claim that the deductions came about because of a failure to factor in one or more allowances that should have counted towards normal pay. Taking the foregoing approach, I consider that, applying the law correctly to the facts found, the tribunal would have been bound to conclude that the requirement for the impugned payments to be "sufficiently similar" was satisfied in this case. I therefore substitute a conclusion to that effect.

84. The question of whether there was a sufficient *temporal* connection between the occasions of deduction relied upon by each claimant in a given case remains to be determined by the tribunal. It having been established that there is no "three-month rule", the question of whether the temporal gap between two particular deductions is so long as to break the series is, as a starting point, at large; and I cannot preclude that there might be instances of temporal gaps which the tribunal might find to be long enough to break the chain in the given case.

85. However, I make two points about the approach which the tribunal should take to deciding such issues. The first is that, once again, the statutory purpose must be kept firmly in mind. The second is that the tribunal should not assess whether the "sufficient similarity" and "temporal" tests are satisfied in silos, but in the overall context of the relevant factual matrix, and recognising that one may have a bearing on the other. In particular, if all of the complaints by a given claimant are of deductions from holiday pay, proper account must be taken, when considering temporality, of the fact that there will inherently be gaps in time between successive holidays.

Ground 4 – designation

86. On this issue, the tribunal said this:

> **"54. Two questions arose from this. The first was whether the respondent was entitled to, and did, designate the first tranche of leave taken by each individual in each leave year as statutory leave taken under WTR, or whether the claimants were each entitled**

> **to take their first tranche of leave as contractual leave. Ms Barsam drew attention to paragraph 82 of Bear Scotland, in which the EAT rejected the tribunal's view that it was a matter of choice for the claimant. "In the absence of detailed contractual provisions the power of an employer to exercise control, which is inherent in every contract of employment, means it is entitled.. to direct when holiday should be taken. It therefore has the power to direct when, within the leave year, [statutory] holiday should be taken."**
>
> **55. Mr McNerney submitted that there was "no credible way" of assigning or designating a particular day as one or the other, as nobody had been told at a particular time that leave was designated as contractual or statutory. Ms Barsam in reply stressed that the respondent is rightly prescriptive in the grant of holiday rights, and indeed that parts of the claimants' case and grievance has been about the degree of prescription. She submitted that the hierarchy of obligation to which the respondent was subject began with the obligation to grant statutory leave. Perhaps unfairly, I asked counsel in closing whether either had ever in practice encountered a situation where an employer had expressly designated a specific period of leave as statutory or contractual, and neither had (I add that I am in the same position).**
>
> **56. I respectfully adopt the above reasoning of the EAT. In so doing, I note two further factors in particular. While CAWTR and WTR create rights for workers, they impose obligations on employers. It is for the employer to fulfil its obligation to grant leave by allocating and designating leave as appropriate. Secondly, I take the quotation from the World Wide Agreement as stating at three separate points that WTR leave has priority and, indeed, imposing on crew the obligation to "ensure the WTR leave is discharged." While I accept that I have been shown no precise parallel wording for EF, I do not accept that the respondent discharged the same obligation differently to the two fleets. I conclude therefore that the respondent was entitled to designate the first tranche of leave taken as statutory leave."**

87. This ground raises, potentially, two questions. Firstly, did the tribunal err in concluding that, as a matter of law, the respondent *could* designate which particular days represented statutory, as opposed to purely contractual, holidays? Secondly, even if the law would have permitted the respondent to do so, did the tribunal err in concluding that it actually did so on the facts of this case?

88. The passage in **Bear Scotland** on which the present tribunal relied was *obiter*. Further, this topic has also now been considered by the Supreme Court in **Agnew**. In that case the overall leave entitlement derived from three sources, being the Directives, domestic regulations and contract. the tribunal in that case rejected an argument that workers were to be taken to have used up their leave under the Directives first, as making no sense. The reality was that both the worker and the employer regarded leave entitlement as a composite whole. That was the only sustainable interpretation. Any individual leave days taken from the overall pot were not possible of being allocated to one category

© EAT 2024

or another. So each day's leave must be treated as a fraction of the composite whole.

89. The NICA agreed, and was, in turn, upheld by the Supreme Court in the following passage:

> **"132. The issue here concerns the finding of the Court of Appeal, at para 119, in agreement with the Tribunal, that a worker is entitled to enjoy leave from whichever legal source it may be derived and that there is no requirement as a matter of law that the leave derived from different sources must be taken in a particular order.**
>
> **133. The Appellants contend that the Court of Appeal ought instead to have distinguished between the types of annual leave to which police officers and civilian workers are entitled, and ought to have held that the minimum entitlement to annual leave, based on EU law, must be or be treated as having been taken first, followed by any additional leave such as the additional 1.6 weeks allowed by domestic law and the two days allowed by the Respondents' terms and conditions. They rely in support of this submission on the approach described by Langstaff J in *Bear Scotland*, at paras 115-118, and his observation that the description of leave as "additional leave" suggests that the dates of it should be the last to be agreed upon during the course of a leave year. They continue that the Court of Appeal's failure to do that has implications for:**
>
> **(i) time limits, because compliant payments of annual leave or substantial gaps between the taking of WTD derived leave may interrupt a "series" of payments for the purposes of article 55(3) ERO; and**
>
> **(ii) quantum because of the "series" point, and in any event because annual leave taken at different times throughout the year will attract a different level of payment depending on the "normal" pay leading into such leave.**
>
> **134. There can be no doubt that the significance of this issue is considerably diminished by our conclusion that a series of deductions or underpayments does not come to an end, as a matter of law, simply because it has been interrupted by a lawful payment. Nor does an interval of more than three months between deductions or underpayments necessarily mean that the relevant series has been broken. Be that as it may, we are satisfied that the Court of Appeal came to the right conclusion, as did the Tribunal.**
>
> **135. First, we agree with the Court of Appeal that the fact that some of the leave to which a worker is entitled under domestic law may be described as "additional" says nothing about when and how it must be taken relative to other leave to which the worker is entitled in that same period under the WTRs (NI) and for which the worker is entitled to be paid his or her normal pay including an amount to reflect overtime worked.**
>
> **136. Secondly, the ultimate source of the entitlement to leave, whether it be in EU or purely domestic law, has no bearing on the importance of that leave to workers who are likely to look at their annual leave entitlement as a composite whole.**
>
> **137. Thirdly, if and in so far as it is not practicable to distinguish between different types of leave then all the leave to which the worker is entitled must form part of a single, composite pot, and the Tribunal and Court of Appeal were right so to conclude.**

> **138. Finally, we accept the submission made on behalf of the Respondents that for the Appellants now to contend that a worker was taking leave from a particular entitlement at a particular time and so argue that the series of deductions they suffered was interrupted and brought to an end, would be to deny them sums which they ought to have been paid, and looking forward, antithetical to the purpose of the entitlement to paid leave, which is to ensure that they take the holidays they need to maintain their health and wellbeing."**

90. Ms Barsam noted that the Supreme Court held (at [132]) that there is no requirement or presumption *as a matter of law* that leave should be taken in a particular order. She highlighted the observations, at [136] that workers who are "likely" to look at their leave entitlement as a composite whole, and at [137] that "in so far as it is not practicable to distinguish" between different types of leave then it "must form part of a single, composite pot." This approach, she submitted, did not preclude the parties from designating as a matter of contract the order in which leave might be taken.

91. Ms Newbegin noted that the **2004 Regulations** contain no equivalent of the power which regulation 15 of the **1998 Regulations** (referred to by the EAT in **Bear Scotland**) give the employer to designate (subject to notice requirements) when the employee is to take their statutory leave. She also noted that regulation 17 of the **1998 Regulations** enables employees to take advantage of whichever right may be more favourable, be it statutory or contractual. She also noted that at [138] the Supreme Court postulated that an employer cannot, after the event, purport to designate that a worker was taking leave from a particular entitlement at a particular time, so as to argue that a potential series of deductions was interrupted by the pattern of gaps thus created.

92. It appears to me that under the **2004 Regulations** there is no statutory power for the employer to designate which leave days are to be treated as statutory as opposed to contractual. I agree with Ms Barsam that **Agnew** does not entirely preclude the *contract* granting such a power in a given case. But the purported exercise of any such power could not be relied upon to make the worker's position in relation to a time point less favourable that it would have been, had it not been exercised. (I add that the same principle would appear to me necessarily to apply to the power under regulation 15 of the **1998 Regulations**. I also do not think that regulation 17 has any bearing on this issue.)

© EAT 2024

93. Did the present tribunal, however, err in concluding that there had in fact been a designation in this case? I agree with Ms Newbegin that it did. That is for the following reasons.

94. As Ms Barsam acknowledged, in light of **Agnew** the first of the two factors relied upon by the tribunal at [56] must fall away. In relation to the second factor, the provisions of the World-Wide Agreement in question were referred to by the tribunal at [53]. They are as follows.

95. The starting point is a provision for full-time Cabin Crew to have an initial annual leave entitlement of 30 days, rising to 36 days after five years. There are then two seasons – summer and winter – in respect of each of which there are defined time windows during which employees may bid for leave dates. Thereafter leave is allocated and published by a specified date. Clause 25.1 then provides for a further 21-day window during which crew can seek to book leave "up to WTR levels." After that additional window has closed "the following 28 days will be used by scheduling for WTR leave allocation". Clause 21.6 provides that Cabin crew make take "up to 16 days of their entitlement in the summer season, but must ensure that WTR leave is discharged"; and clause 21.7 that they may take "up to 20 days of their entitlement in the winter season, but must ensure that WTR leave is discharged." All of these provisions are subject to pro-rating in respect of part-time crew.

96. Standing back, it appears to me that the general intention is (a) that a worker who had not been initially allocated the maximum number of statutory dates could apply for further days up to WTR levels, and if they so applied, would at least be granted those further days; and (b) that the respondent required crew to at least seek the number of dates corresponding to their statutory entitlement (even if they did not trouble to use their maximum contractual entitlement). This gets Ms Barsam some way down the road in arguing that these provisions envisaged statutory days being taken first. However, her case then runs into the following difficulties.

97. The first is that, on my reading, clause 21.5 would not bite in a given case unless the crew

member had initially been allocated less than their statutory entitlement, and then requested further days up to their entitlement. It may be said, in such a case, to create a power on the part of the respondent, but that is not the same as finding that the power was generally exercised. Further, the obligations in clauses 21.6 and 21.7 fall on the crew member; they do not give a power of designation to the respondent. Nor do they specifically provide that the days taken are to be deemed to have been taken, as between statutory and contractual, in a particular order. In a case, where, for example, a five-year server applied for, and got, their full 16 days in summer, and 20 days in winter, these provisions would not indicate which was which. Further, the imposition of such maxima for each season, coupled with the requirement to take statutory leave in each season, suggests that what is envisaged is a pro-rating of statutory leave to each season proportionate to its length, but, again, no particular order of statutory and contractual leave within the season.

98. Further, in any event the tribunal's conclusion at the end of paragraph [56] was that the respondent was "entitled" to designate the first tranche of leave as statutory leave. Even if the tribunal concluded without error that the WWA gave the respondent the *power* to designate (at the time), particularly in light of the foregoing aspects, I do not agree with Ms Barsam that this paragraph amounts to a finding, or proper inference, that it in fact generally did so. Nor did Ms Barsam gainsay Ms Newbegin's submission that there was, for example, no evidence that the respondent had in fact at the time purported to exercise any power (if clause 21.5 did confer it) to designate statutory leave dates after the bidding window had closed, generally or in any given case.

99. As for Euro Fleet, they were governed by their own, different, agreement, and the respondent did not rely on any specific provisions of it on this point. Given that, and in the absence of it being suggested that there was evidence of actual designation being exercised in relation to Euro Fleet, I agree with Ms Newbegin, that the tribunal's statement that it "cannot accept" that the respondent discharged the same obligation differently in respect of the two fleets, is not a proper basis for its conclusion that there was also designation in relation to Euro Fleet.

© EAT 2024

100. Ms Newbegin submitted that, if I reached this point, then I should conclude either that the contractual and statutory entitlements fall to be treated as a composite whole, with every leave day accounting for the same respective proportions of each entitlement as every other leave day; and/or that it was open to the claimants, as part of their tribunal claims, to designate which day was which. I reject the latter proposition. It was not suggested that there was any practical way, in the real world, in this case to tell a leave day of one type apart from one of the other type, nor that any of the claimants purported to so designate at the time. I do not think that they could purport to do so retroactively after the event. The correct answer to the series of deductions question must turn on the application of the relevant principles to what in fact happened at the time, as events unfolded.

101. I therefore uphold the claimants' ground 4, and will direct that the matter returns to the tribunal, on the basis that, in all cases, there has been no designation either way, and all leave days are to be treated equally as part of the composite whole.

Ground 8 – Commission on Duty Free Sales

102. The tribunal's salient findings on this topic were, in summary, as follows.

103. Ten per cent of the duty free sales on a given flight formed a pot shared among the cabin crew on that flight, with the customer service director (CSD) receiving a double share. So, if there were, say, nine crew, including the CSD, the CSD would receive 2% of sales and the others 1% each [89]. Commission was ordinarily earned on every flight, paid monthly in arrears and taxable [90].

104. For reasons it set out, the tribunal concluded that these payments were intrinsically linked to the performance by cabin crew of their job tasks [99]. However, the tribunal concluded at [100]:

> **"I find that for each claimant, commission earnings were a very minor part of the pay package, and certainly not a significant element in pay. I find that the sums involved were such that it highly unlikely that their exclusion from holiday pay had, or would have had, any deterrent effect in taking annual leave; and there was in any event no evidence to that effect."**

© EAT 2024

105. The tribunal added that the same applied to Mr Duffy, even though he was a CSD. It went on to conclude that commission earnings were not to be counted for holiday pay purposes.

106. This ground asserts that the tribunal erred in relying on its finding that excluding commission from holiday pay was highly unlikely to have a deterrent effect. Ms Newbegin submitted that this approach is contrary to the guidance in **Williams**. That requires holiday pay to correspond to normal remuneration and any payment intrinsically linked to the performance of tasks must be taken into account. There is no additional requirement that not to do so must have a deterrent effect.

107. Ms Barsam disagreed with that analysis. She also referred to the EAT in **Willetts** at [35] having preferred the submissions of counsel for the employees in that case, which had included at [33] the proposition that "any financial disadvantage may deter a worker (subject to de minimis principles)". She submitted that the present tribunal's approach was a permissible application of the de minimis principle. Ms Newbegin in reply highlighted the statement, further on in **Willetts** at [39], that "[i]n each case the relevant element of pay must be assessed in light of the overarching principle and objective of Article 7 which is to maintain normal remuneration so that holiday pay corresponds to (and is not simply broadly comparable to) remuneration while working".

108. My conclusions on this ground follow.

109. First, the observations of the Court of Justice in **Williams** must be read in the context of the particular questions it was asked to answer. These included, at question 2, whether it was "sufficient that … the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of the words, his or her annual leave; and does not involve any sensible risk that the worker will not do so". This was followed by question 3: "Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's 'normal pay'."

110. These two questions, as a pair, therefore postulate alternative analyses. Embedded within the

first is the assumption that there could be an amount of holiday pay, that is not equal to normal pay earned when working, but is nevertheless not so low that the worker will, for that reason, be deterred from taking the holiday. The first analysis postulates that, if so, that would be sufficient to comply with Community law. The second analysis rejects that, holding that, to comply with Community law, holiday pay must, instead, equate to normal pay, but asks whether the test of that, is that it must "correspond precisely with" or "be broadly comparable to" normal pay.

111. The Court of Justice, as Lord Mance observed, gave a compendious answer to all of the questions posed. But the Advocate General's analysis is instructive. This emphasises that holiday pay must be equivalent to normal pay and that if the Court's past use of the word "comparable" had been thought to mean been that something less will do, that was a misunderstanding. It means "correspond exactly" to normal pay [47]. Further, the worker must not suffer "any disadvantage" as a result of deciding to exercise the right to annual leave; and a "prime example" of such a disadvantage is any financial loss which would deter him from exercising that right [51]. This leads to the conclusion that it would not be compliant for holiday pay to be "just enough to ensure that the worker is not prevented from exercising his right to paid annual leave, which would not constitute "maintenance of remuneration." [53] A criterion of financial affordability is also rejected for other reasons at [54]. The Advocate General then answers the paired second and third questions at [90/2] (see [18] above) by adopting the second analysis and rejecting the first.

112. Accordingly, it is not the law that, if holiday pay is at least high enough to avoid a deterrent effect, that will be sufficient, even though it falls short of normal pay. While, in a given case, some element of imprecision or error in calculation or assessment might be forgiven, applying a de minimis approach, that does not mean that a particular allowance which satisfies the material and temporal components of normal pay need not be included in holiday pay, if it is considered that its omission would not have a deterrent effect. The tribunal appears to me to have discounted this allowance for that reason, and, in so doing, made a principled error. I will therefore allow ground 8.

© EAT 2024

Ground 9 – Back-to-Back Allowance – Mr Ardabili

113. Ground 9 relates specifically to the tribunal's conclusion that an allowance called Back-to-Back allowance should not form part of Mr Ardabili's holiday pay in the year for which the reference year was 2008/2009. The tribunal noted that Mr Ardabili only became eligible for that allowance after the first seven months of that year. Having done so, he received three such payments in the remaining five months. However, the tribunal considered that "I must look at the pay reference year as a whole, not just the last 5 months", and then concluded that three payments in that 12-month period was insufficient for that allowance to count as part of normal pay for that year [117 – 118].

114. The short challenge brought by this ground is that it was an error to use the full 12 months as a reference period, given that Mr Ardabili only became eligible for this allowance at all when he moved from Euro Fleet to World Wide Fleet at the end of month seven.

115. I uphold this ground. The underlying principle, as expressed for example by the Advocate General in **Williams** at [90(3)], is that there should be a "sufficiently representative reference period". While, in a general sense, the period should be sufficiently long to be representative, the tribunal's approach should not be mechanistic. It must, in each case, use a period which can be treated as fairly representative of what ordinarily is the typical pattern during periods when the employee is actually working. A period during which the employee was working in a distinct role, and not eligible for an allowance, cannot be properly treated as representative of the normal pattern in relation to it. The tribunal therefore erred in its approach. A different question is whether the payment of this allowance on three occasions in a five-month period was sufficient to qualify it as normal pay in respect of the following leave year. That is a question that I must leave to the tribunal to assess upon remission.

Outcome

116. I therefore uphold the respondent's appeal and also all four of the claimants' grounds of appeal, including, as to ground 5, in respect of [39.4] of the tribunal's decision as well as [39.3].

© EAT 2024

117. The matter will now return to the tribunal to determine, or determine afresh, the relevant issues relating to: whether meal allowances were or were not part of normal pay; whether commission on duty free sales formed part of normal pay; whether Back-to-Back allowance formed part of Mr Ardabili's normal pay in the relevant part of the reference year 2008/2009; and time limit issues. The tribunal will also, of course, need to decide the remaining issues necessary to determine the precise amounts of the awards to which each of the claimants will be entitled.

118. It was common ground on all sides that, in all the circumstances, including the significant time that has passed since the original decision, any remission should now be to a different judge, and I will so direct. However, the fact that appeals on both sides on the selection of issues that came to this hearing have succeeded should not detract from due recognition that the thorough and meticulous decision of Employment Judge R Lewis has already resulted in the bulk of the issues raised by this wide-ranging and factually and legally complex dispute being resolved. Further, he has made extensive findings of fact which will provide the foundation for the work that remains to be done when the matter returns to the employment tribunal, to bring this litigation to a conclusion. However, I will leave all matters of further case management, including as to whether any further evidence may be required or permitted, to the tribunal itself.

© EAT 2024